In the Matter of Arbitration
Between

City of Saint Paul,

Employer

and

International Association of Firefighters, AFL-CIO
Local 21

Union

BMS Case No.: 06-PA-10
Suspension of Patrick Flanagan

A. Ray McCoy
Arbitrator

Opinion and Award

February 6, 2006

Appearances:

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Jurisdiction

The International Association of Firefighters Local 21 (hereinafter “Local 21" or “Union”) filed a grievance challenging the City of Saint Paul’s (hereinafter “City” or “Employer”) decision to suspend Fire Captain Patrick Flanagan (hereinafter the “Grievant”) for two 24 hour work shifts. The City issued the discipline after finding that the Grievant violated the City’s Workplace Conduct Policy. The parties processed the grievance through the various steps in the collective bargaining agreement that was in effect at the time the dispute arose. (Jt. Ex. 1, Agreement Between The City of Saint Paul and the International Association of Fire Fighters AFL-CIO Local 21, 2002-2003,(hereinafter “CBA” or “Agreement”). The Union requested arbitration and the undersigned arbitrator was notified of his selection to hear this matter by letter dated July 26, 2005.

The parties selected a hearing date of October 19, 2005. The hearing was held on that date at City Hall in Conference Room B, Board of Ramsey County Commissioners, Room 220, 15 West Kellogg Boulevard, Saint Paul, Minnesota. The parties had a full and fair opportunity to present evidence in the form of examination and cross-examination of witnesses and the introduction of documents in support of their respective positions. The parties elected to present oral closing arguments. The record was closed at the conclusion of the hearing. The collective bargaining agreement describes the authority of the arbitrator as follows:

> The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of the Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted. The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. The arbitrator’s decision shall be submitted in writing within thirty (30) days following close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be based solely on the arbitrator’s interpretation or application of the express terms of the Agreement and to the facts of the grievance presented. (Agreement, Article 6(a) and 6 (b).)

The parties agreed to provide the arbitrator additional time beyond the thirty day period called for in the Agreement to render the decision and award.

Issues

The specific issues agreed upon by the Parties and submitted to the arbitrator for decision are as follows:

1. Did the City have just cause to find that the Grievant created a hostile work environment?

2. If so, did the City have just cause for the level of discipline imposed upon the Grievant?

Collective Bargaining Agreement

Relevant Provisions

ARTICLE 33 – DISCIPLINE

33.1 The Employer may discipline employees in any of the forms listed below:

Oral reprimand
Written reprimand
Suspension
Demotion
Discharge

The Employer will discipline employees for just cause only and in accordance with the concept of progressive discipline. Employees who are disciplined pursuant to the terms of this Article may appeal the Employer's disciplinary action through either the grievance procedure set forth in Article 6 of this Agreement or to a civil service authority pursuant to the rules and procedures of such authority.

City Policies

City of Saint Paul Workplace Conduct Policy
A Policy Against Discrimination, Violence and Offensive Behavior in the Workplace

It is the policy of the City of Saint Paul to maintain a respectful work and public service environment. The City of Saint Paul will maintain a work and public service environment free from discrimination, violence, harassment, and other offensive behavior. The City of Saint Paul will not tolerate such behavior by or toward any employee or officer. Any employee or officer of the City of Saint Paul who engages in such behavior is subject to consequences. Discriminatory behavior includes inappropriate remarks about or conduct related to an employee's race, color, creed, religion, national origin, disability,

sex, marital status, age, sexual orientation, or status with regard to public assistance. Violent behavior includes the use of physical force, harassment, intimidation, or abuse of power or authority when the impact is used to control by causing pain, fear or hurt. Violent behavior also includes verbal abuse and/or acts, words, comments, or conditions that would lead a person to reasonably believe a violent act could occur. Harassment includes words or conduct that is severe or pervasive, and that a reasonable person would find abusive. Behavior prohibited by this policy also includes requests to engage in illegal, immoral or unethical conduct, or retaliation for making a complaint under this policy. *(All behaviors prohibited by this policy have not been explicitly covered herein. The definitions used are for illustrative purposes and are not meant to be all inclusive.)*

Background/Findings of Fact

The Grievant, is a Fire Captain and therefore supervises a crew of firefighters. In addition, the Grievant is president of Local 21. On March 27, 2005, the Grievant was serving as Fire Captain at Ladder No. 8 when Firefighter Jones, an African-American, arrived to serve a duty trade at Ladder 8. Ladder 8 was not Firefighter Jones' regularly assigned work location. When Firefighter Jones walked into the watch office of Ladder 8 that morning the majority of the rest of the firefighters assigned to Ladder 8 were seated there including the Grievant. The moment Firefighter Jones sat down everyone in the room got up and left with the exception of the Grievant. Firefighter Jones, surprised by the sudden departure of the rest of his co-workers, said to the Grievant "Wow, sure did clear out when I walked in." The Grievant responded by saying that Firefighter Jones should get use to that happening if he continued to help the administration.

The administration, under Fire Captain Holton's leadership embarked upon an ambitious diversity program designed to increase the number of minority firefighters. Firefighter Jones was one of several volunteers who assisted Captain Holton with breathing new life into the Department's defunct diversity committee. Firefighter Jones also engaged in recruitment activities on behalf of the Department that were designed to increase the number of minority applicants for firefighter positions.

According to Firefighter Jones, the number of minority applicants

increased significantly as a result of the diversity committee's work. Among other results, the increase in minority applicants led to an increase in the number of firefighters needed to help the new crop of applicants prepare for the physical portion of the test required to become a firefighter. Fire Chief Holton again turned to the members of the diversity committee to secure the additional help needed to prepare the applicants for the physical test. Chief Holton informed members of the diversity committee that they would receive overtime compensation in exchange for their assistance with training.

It was the Chief's offer of overtime to only members of the diversity committee that led some of the white firefighters to complain to the Grievant that Firefighter Jones and others were helping the administration to undermine the Union's position with regard to how overtime should be allocated. Chief Holton subsequently withdrew the limitation on his offer of overtime for assistance with training by making it available to firefighters who were not members of the diversity committee.

The Grievant received numerous complaints from members about the initial limitation on the overtime opportunity. It was clear that some firefighters were grumbling about what they perceived to be the Chief's special treatment of Jones on the day he arrived at Ladder 8. In fact, Jones testified that he overheard portions of at least two conversations during the brief time he was at Ladder 8 that were clearly about him and the overtime issue. Those conversations ended abruptly when those engaged noticed he was present.

Many of the complaints received by the Grievant included the familiar rhetoric of preferential treatment. Those complaining assumed that the Chief was giving special treatment to minority firefighters. The Grievant decided to let Firefighter Jones know that there was indeed animosity within the bargaining unit and at Ladder 8 that day.

The Grievant explained to Jones exactly how he and those members who had complained felt about the overtime opportunities. The Grievant told Jones that he was helping the administration circumvent union laws by taking the overtime. Jones said he was unaware of the union's

position regarding the overtime for members of the diversity committee. The Greivant then asked Jones if he felt that the administration was using him because he is Black. Jones replied that he thought he was selected because of his skills. The Grievant went on to say that other minority firefighters receiving overtime were not qualified and that he (the union) would be talking to them as well. The Grievant then said that he was willing to give Jones the benefit of the doubt but felt that Jones needed to know what was going on.

Firefighter Jones testified that he was confused and blind-sided by the comments and felt uncomfortable at Ladder 8 afterwards. Jones later mentioned the conversation to Michael L. Gulner, District Fire Chief, who because of his supervisory status informed Jones that he was required to report the incident as a potential violation of the department's prohibition against discrimination in the workplace.

Chief Holton called for an investigation and assigned that task to the Internal Affairs unit of the Saint Paul Police Department. The sergeants conducting the investigation completed their work and issued a report dated May 3, 2005. The sergeants recommended that the portion of the complaint regarding the abrupt departure from the watch room by the other members of Ladder 8 did not amount to a violation of the Workplace Conduct Policy. (City Ex.4, p. 12) The sergeants concluded that the Grievant's conduct, however, did amount to a violation of the Workplace Conduct policy.

Chief Holton accepted the recommendations. The Chief reviewed the Grievant's disciplinary record but did not consider the Grievant's performance evaluations in arriving at the level of discipline he felt was warranted in light of the sergeants' findings. Chief Holton testified that he did not consider the Grievant to be acting as a union president at the time he made his remarks and that the Grievant's status as union president had no bearing on his decision regarding discipline. Chief Holton suspended the Grievant for two 24 hour work shifts. Chief Holton explained his reasons for suspending the Grievant as follows:

> "When Firefighter Jones asked you why everyone had left, your response led Jones to believe there was animosity over the distribution of overtime. You then asked Jones what the criteria

was for getting overtime at the training center and then asked him if he was offered overtime because he was black. Your comments and behavior caused Jones to believe that the exit of the crew from the watch office was an orchestrated event, based upon his race and he could expect further ostracization in the future. At the time of the incident you were Firefighter Jones' supervisor. You hold the rank of Fire Captain and in that role you are responsible for the enforcement of department wide rules and regulations, as well as the supervision and direction of personnel...I find that you violated the City of Saint Paul Workplace Conduct Policy by creating a intimidating and hostile work environment for Firefighter Jones by leading him to believe there was animosity toward him and he was being ostracized." (City Ex. 1)

Position of the Parties

The Employer

1. The City's two-day suspension of the Grievant for violating the City's Workplace Conduct Policy was appropriate and consistent with the requirements of the collective bargaining agreement.

2. The Grievant confronted Firefighter Jones about an overtime dispute while serving as his supervisor.

3. The statements made by the Grievant to Firefighter Jones were harassing, intimidating and hostile.

4. The Grievant was disciplined for making statements as a fire captain not as a union president.

5. The Grievant's statement to Firefighter Jones implied that race was a factor in his receiving training overtime.

6. The Grievant's statements implied that Firefighter Jones would be ostracized by co-workers and that the Union would not back him in future situations.

7. The Grievant's comments and behavior caused Firefighter Jones to believe that the exit of the crew from the watch office was an orchestrated event, based upon his race and he could expect further ostracization in the future.

8. The Grievant's comments to Firefighter Jones were inappropriate and intimidating because the Grievant was working as a supervisor and was responsible for the enforcement of department wide rules and regulations as well as the supervision and direction of the crew members present.

9. The Internal Affairs investigation revealed that the Grievant violated the Workplace Conduct Policy by creating a intimidating

and hostile work environment for Firefighter Jones.

10. The Grievant created the intimidating and hostile work environment for Firefighter Jones by leading him to believe there was animosity toward him and he was being ostracized.

11. The Grievant's prior disciplinary record, the gravity of the behavior and the fact that he was serving in a supervisory capacity at the time supported the level of discipline imposed.

12. The City of Saint Paul's Workplace Conduct Policy prohibits discrimination, violence, harassment, and other offensive behavior.

13. Discriminatory behavior includes inappropriate remarks about or conduct related to an employee's race, color, creed, religion, national origin, disability, sex, marital status, age, sexual orientation, or status with regard to public assistance.

14. Harassment includes words or conduct that is severe or pervasive, and that a reasonable person would find abusive.

15. The Workplace Conduct Policy promotes a good work environment for all employees and promotes teamwork and trust. It must be free of conduct that is intimidating and it must be free of harassment.

16. Firefighter Jones felt fear and intimidation and hostility in that he felt he would not be backed up by the other members of the crew.

Union's Position

1. There is little dispute as to the conversation that took place between the Grievant and Firefighter Jones. The dispute is over whether the conversation amounted to intimidation and harassment.

2. The Employer did not have just cause to discipline the Grievant and the level of discipline even assuming that just cause existed was not in keeping with the progressive disciplinary requirements of the Agreement.

3. The Grievant was speaking as the president of the union when he asked Firefighter Jones about whether he felt he was getting overtime because of his race.

4. The Grievant's conversation cannot be characterized as having caused a hostile work environment.

5. The Grievant's conduct was not persistent or pervasive enough to alter the terms and conditions of Firefighter Jones' employment.

6. No misconduct took place and therefore no discipline should have

been imposed.

7. The definition of hostile environment discrimination has not been met. The City's policy defines hostile work environment.

8. The courts have defined the term "hostile work environment" and have said, in part, that the words or conduct must be severe, pervasive, and sufficiently so as to create an abusive work environment.

9. The legal definition of hostile work environment precludes a finding that the Grievant created a hostile environment for Firefighter Jones. The two were engaged in a single conversation that about race and the distribution of overtime.

10. The Grievant was acting in his capacity as union president and was explaining that the union might not back Firefighter Jones if he continued to assist the administration to undermine the rules regarding the distribution of overtime. The Employer should have spoken to the Grievant in his capacity as union president if it did not want to have such conversations taking place in the workplace but should not have disciplined the Grievant for having a conversation about a union concern.

11. Assuming just cause was shown the level of discipline imposed on the Grievant was inappropriate. The Captain said he relied on the prior disciplinary record of the Grievant in arriving at the 48 hour suspension. There was a suspension included in the Grievant's file that had been revoked but that was considered by the Fire Chief in arriving at the level of discipline.

12. The Grievant performance has been excellent. Specifically, his performance evaluations show that he has high marks for upholding policies of the City and basically has a stellar record in that regard.

13. The Grievant's prior disciplinary record included two written reprimands. One was for calling in sick on a weekend twice within less than three months. The other was for failing to see the doctor on the day that he was sick and not at work. The third item involved a suspension of the Grievant that was later revoked. This disciplinary record does not warrant moving to a 48 hour suspension.

Opinion and Award

Issue 1

Did the City have just cause to find that the Grievant created a hostile work environment?

The City's Workplace Conduct Policy states:

> The City of Saint Paul will maintain a work and public service environment free from discrimination, violence, harassment, and other offensive behavior...Discriminatory behavior includes inappropriate remarks about or conduct related to an employee's race, color, creed, religion, national origin, disability, sex, marital status, age, sexual orientation, or status with regard to public assistance...Harassment includes words or conduct that is severe or pervasive, and that a reasonable person would find abusive. (City Ex. 6)

In order for the City to maintain that its' discipline of the Grievant was supported by just cause it must demonstrate that the Grievant violated the express language of the Workplace Conduct Policy. The specific language requires a finding that the Grievant made "inappropriate remarks" about or engaged in "inappropriate conduct" related to Firefighter Jones' race. In addition, the City would have to demonstrate that the Grievant's inappropriate remarks amounted to "severe and pervasive" conduct that was "abusive" to Firefighter Jones or that "created a hostile environment." The arbitrator finds that the City has not met its burden in light of the facts of this case as applied to the language of the Workplace Conduct policy.

Accepting Firefighter Jones testimony as true, the arbitrator finds that the City's characterization of the Grievant's language and conduct on the day in question does not amount to a violation of the Workplace Conduct Policy. The arbitrator is convinced that the Grievant was acting in his capacity as president of Local 21 and therefore his conversation with Jones was appropriate. There is no dispute that the Grievant received complaints regarding both the Chief's grant of overtime to only members of the diversity committee and about the minority members of the union who accepted that overtime. Had the Grievant ignored the complaints and said nothing, he would have certainly been considered a failure as a leader of unit members seeking equal access to overtime opportunities. It is certainly possible to disagree with the manner in which the Grievant sought to respond to the complaints he received, however, it is inaccurate to describe his

response as inappropriate given the context in which it occurred.

The perception of the Grievant and some members of the bargaining unit was that the diversity committee was composed primarily of minority firefighters. While it is a narrow view of the committee it is not an unreasonable one. The Chief extended the offer of overtime to only members of the diversity committee. He did not extend it to other members of the bargaining unit. The Chief was obviously trying to attract firefighters to assist the minority applicants who he believed were sympathetic to his diversity initiatives and goals. Against this backdrop, the Grievant's discussion of race with Firefighter Jones is very appropriate. As leader of the Union, the Grievant asked a relevant question that was not designed to demean, harass or interfere with Jones' work environment. The question did not contain a racial slur but was a legitimate one requesting information as to whether Jones understood the criteria used by the Chief to grant overtime.

Jones testified that the Grievant spoke in a normal voice and that he was not yelling or angry. The inquiry was relevant and appropriate if the Union was to prepare a response to the Chief regarding its objections to the grant of overtime to only diversity committee members. To ignore the legitimate role of the union president to undertake such an inquiry is to undermine the Union's ability to engage in conversations that might assist it with its lawful representation responsibilities.

The history of struggle within fire departments across the country faced with significant diversity or affirmative action initiatives is well-known. Unions have struggled with the perception that minority firefighters have received preferential treatment in hiring and promotion decisions. Overtime and layoff procedures have proved sacred territory for firefighter locals. Fashioning an appropriate response that does not pit member against member is extremely difficult. Here, it was the decision of the Chief to give overtime opportunities to only members of the diversity committee that sparked the disagreement. The Union was obligated to fashion a response. It is unfortunate that the Grievant, in his capacity as president, chose to burden Jones with the

Union's concern but one can hardly call the conversation inappropriate.

Firefighter Jones testified that he engaged the Grievant in a conversation as to why his fellow firefighters and union members appeared to shun him. The Grievant took the opportunity to make Jones aware of the fact that some of his co-workers were not satisfied with the fact that he was accepting overtime and that they viewed his acceptance of the overtime as helping the administration undermine the Union.

In any case, Jones did not say that the Grievant was hostile, angry, yelling or behaving in a manner that suggested anger or disrespect. Jones testified that the two of them had a conversation that was in all respects civil and straightforward. Jones said that at the end of the conversation, the Grievant said: "Well, I just wanted to give you the benefit of the doubt and let you know what to expect if you choose to continue helping them." (City Ex. 4, p.2) Jones also testified that he had interacted with and worked with the Grievant on previous occasions. Jones said he respected the Grievant. Furthermore, Jones said he did not go to breakfast right away because he asked the Grievant to let the other firefighters know that he was not a "back stabber."

The Internal Affairs investigators and the Chief seem to have concluded that there was no animosity regarding the overtime issue and therefore no reason for the other members of Ladder 8 to respond negatively toward Jones. However, the controversy regarding the overtime was indeed real. In fact, the Chief removed the restriction on the grant of overtime and made it available to others after learning of the Union's objections. At least one of the crew of Ladder 8 acknowledged that there was an issue regarding the Chief's original decision on the overtime. That firefighter told the Internal Affairs investigators that "it was his opinion that the overtime should be distributed fairly." He also told the investigators that "he was told that certain people were hand-selected to do the overtime in training instead of going with the overtime list (seniority list)." (City Ex. 4)

The Grievant's statements to the Internal Affairs investigators

makes absolutely clear that the issue was clearly a concern to the Union. The Grievant told investigators that the Union and City had historically distributed overtime on the basis of seniority. The Grievant also told them that while the provision was not in the collective bargaining agreement that it has been the practice for the last 20 years to distribute overtime according to seniority. The Grievant told investigators that he told Jones that the word was that another minority firefighter had received 40 hours worth of overtime at the training center and that the Union felt it was preferential treatment. (See City Ex. 4, p. 10) It is difficult to imagine how the conduct of the Grievant could not be considered related to Union business.

The arbitrator is aware that Firefighter Jones said he felt he was in a hostile environment. However, the proper inquiry is whether reasonable people would consider the statements made by the Grievant to be conduct so severe and pervasive as to create a hostile environment. While, it is possible that one conversation can result in a hostile environment, the conversation at issue here was not of that type.

Jones served less than a half day at Ladder 8. In fact, part of his confusion regarding the events of that day had to do with the fact that it was not his usual station and he was filling in for someone else. He did not know the routine of the company at Ladder 8. The Internal Affairs investigators received statements from several of the firefighters at Ladder 8 that day to the effect that the group of firefighters who walked out when Jones sat down were in fact going to prepare breakfast as they normally did each day and that it wasn’t an orchestrated event. (City Ex. 4, p.) Jones acknowledged that he was indeed invited to breakfast and that nothing unusual transpired during breakfast.

The evidence simply does not support a finding of hostile environment. Jones is a Union member and one of a small but growing number of minority firefighters. He serves on the diversity committee and has engaged the public in discussions regarding the need to increase the number of minority firefighters. He has encouraged individuals to consider a career as a firefighter. He is obviously use

to engaging in conversations regarding race and capable of understanding the difference between a conversation that includes a discussion of race and one that is designed to demean or harm someone.

Jones acknowledged that while he was confused by the conversation and did not know how he would be treated that he was not afraid for his safety nor afraid of the Grievant. In fact, he jokingly testified that he thought he could "take the Grievant." Jones was comfortable that he could handle himself in an altercation if necessary. It was Jones who decided to test his perception of events by engaging another member of the Ladder 8 crew in a discussion regarding the conversation with the Grievant. Before he could complete that process that individual informed Jones of his responsibility as a mandatory reporter of potential discrimination issues.

Jones therefore did not get the chance to figure out whether he was in a hostile environment or not. The events that followed led to his removal from Ladder 8 and then from a second station by order of the Chief. The language of the Workplace Conduct Policy requires a showing of conduct so severe and pervasive as to create a hostile environment. This requirement is one with which many employers have had to struggle. The United States Supreme Court in Harris v. Forklift Systems, 510 U.S. 17 (1993) said:

> "...whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."

Considering the totality of the circumstances, the arbitrator finds that a reasonable person would not find the conversation with the Grievant to be so severe and pervasive as to create a hostile environment. Jones did not feel physically threatened or humiliated. The conversation did not interfere with his work performance. It did cause him to question his relationship to the Union and to his fellow

Union members. That is precisely why he asked the Grievant to relay to others the fact that he was not a "back stabber."

Most important to the Chief was the fact that at the time of the conversation the Grievant was serving as Jones supervisor. The Chief said:

> At the time of the incident you were Firefighter Jones' supervisor. You hold the rank of Fire Captain, and in that role you are responsible for the enforcement of department wide rules and regulations, as well as the supervision and direction of personnel. The rank of Fire Captain is a first line supervisor and company leader. Because of your position, your comments regarding Firefighter Jones' race and receiving preferential treatment were **particularly** inappropriate and intimidating. (Id. Emphasis added)

The fact that the Grievant was also serving as supervisor doesn't make the conversation inappropriate or a violation of the Workplace Conduct Policy. Serving in a supervisory capacity doesn't deprive the Grievant of his role and responsibilities as president of the Union. It would be difficult to imagine a valid workplace conduct policy that prohibited a discussion of race in the workplace simply because some of those involved in that discussion were supervisors and others were not. It is even more difficult to imagine that the Workplace Conduct Policy was written to deprive the Union president of his right to speak about issues of race and the perceived preferential treatment of some of his members in the workplace. The policy was designed to prohibit conduct so severe and pervasive that it undermined the victim's ability to carry out his responsibilities or that created an objectively hostile or abusive work environment.

Any employer undertaking an aggressive diversity program that has the potential to change the racial composition of its workforce can expect an increase in conversations on the job about race. The task is to sort out when those conversations deviate from appropriate discourse and become a part of a pattern of conduct that creates a hostile and offensive work environment.

It is against this backdrop that the appropriateness of the Grievant's conduct must be judged. The Grievant while serving in a

supervisory capacity was not engaged in actual supervision of employees on an assignment. The arbitrator finds the actual setting here important to the determination as well. Firefighters working 24 hour shifts basically live together. There is no easy way for the Grievant to tell a member he can't hear his complaints or respond to them simply because he is on the job and acting in a supervisory capacity. Obviously, if there was a call to a fire, everything ceases and all attention will be directed to the completion of that task. But, to say that the mere supervisory responsibilities of the Grievant preclude him from acting as union president in this setting is unrealistic and an unfair imposition on the Union. The arbitrator is also persuaded by Jones' testimony that he was uncertain as to how he would be treated that day based on his conversation with the Grievant. However, being uncertain of how your co-workers might treat you does not equate to being harassed because of race or forced to exist in a hostile environment. There is admittedly a careful balancing act to be maintained here. The Chief is concerned about changing a fire department that does not reflect the racial composition of the City it serves. The Chief is also sensitive to the department's track record on race which has not been exemplary. As the Chief noted in his disciplinary letter to the Grievant:

> "As a long time member of the Department you are aware of the history of claims and litigation alleging racial and gender discrimination including claims of ostracization based upon race and gender. I am sensitive to these claims and will not tolerate behavior on the part of Department employees, especially supervisory personnel which results in claims of hostile work environment." (City Ex. 1)

While the Chief's goals are admirable, there is a need to avoid closing off all discussions about race. If, it were impossible to discuss race, it might well be difficult for the diversity committee members to engage one another in critical discussions about their work. It is possible that some members of the diversity committee are likely to be supervisors as well. It is not possible to engage one another in critical discussions regarding the goals and activities of the committee if there is a concern that simply expressing concerns about

diversity as it applies to increasing the racial composition of the department might lead to discipline under the Workplace Conduct Policy.

Just as discussions among members of the diversity committee regarding race are not designed to do harm to anyone but to promote an important goal so was the conversation between the Grievant and Firefighter Jones. The important goal advanced by the Grievant was that of representing unit members bringing a complaint about being excluded from an overtime opportunity. The balancing act required here is not a simple one but it is a critically important one if the City is to advance its much needed diversity goals while not depriving the Union of the right to represent its members.

The City's Workplace Conduct Policy uses language that mirrors state and federal law prohibiting hostile environment harassment. The City seeks to prohibit only that conduct that is severe and pervasive enough to be abusive. A sampling of cases from the Eighth Circuit Court of Appeals reveals that judges have found that hostile environment harassment did not exist in situations which would lead this arbitrator to conclude otherwise. For example, in one case the court accepted the plaintiff's allegations that he had been propositioned on three separate occasions in a nine-month period by a priest with whom he worked. The propositions included requests that the plaintiff view pornographic movies, kissing, along with hugging and other inappropriate touches. According to the court, the priest's behavior did not rise to the level of actionable harassment because none of the incidents were physically violent or threatening. The court also said that the three separate incidents took place over a nine-month period and were therefore not so severe and pervasive as to poison the plaintiff's work environment. (*Legrand v. Area Resources for Community and Human Services*, 394 F.3d 1098, 8th Cir. 2005) In another case, the court refused to find a supervisor had created a hostile environment even though he asked his subordinate to go out with him repeatedly and made two late-night/early morning calls to her home urging her to accept his invitations.(*Henthorn v. Capitol Communications*, Inc. 359 F.3d 1021, 8th Cir. 2004) In yet another case, the court ruled the harassment

experienced by the plaintiff was not severe and pervasive enough to create a hostile environment even though her co-workers called her "Malibu Barbie" two or three times, exchanged back rubs and told sexual jokes in the workplace.(*Erenberg v. Methodist Hospital*, 357 F.3d 787, 8th Cir. 2004) Finally, in another case the court refused to find a hostile environment for a plaintiff married to a Japanese woman who objected to his manager's use of racial slurs regarding Asians and other minorities. The court did not find the conduct to be actionable even though the managers referred to Asians as "Japs," "nips," and "gooks." The court, amazingly found the slurs to be sporadic and therefore not severe and pervasive. (See *Bainbridge v. Loffredo Gardens, Inc.* 378 F.3d 756, 8th Cir. 2004) The arbitrator recognizes that the City's policy is designed to place a much higher burden of professional conduct on its employees than that expressed in the decisions above. Nevertheless, the Policy does impose a burden on both the City and its' employees to distinguish reasonable conversations about race from those designed to create an abusive work environment. In this case, the conversation about race was appropriate and therefore not severe or pervasive enough to create an abusive work environment.

Issue 2 If so, did the City have just cause for the level of discipline imposed upon the Grievant?

Having concluded that the Grievant's conduct was appropriate and did not create a hostile environment, it follows that the discipline was unwarranted. It should be noted that the Grievant compiled quite an excellent work record as a long-term employee. The Grievant has served the City for nearly 23 years. The Chief arrived at the level of discipline without considering the Grievant's performance evaluations. The Chief explained that it is departmental policy to consider only the employee's disciplinary record in making a decision regarding discipline. He said he does not consider performance evaluations when deciding on the appropriate level of discipline. However, a consideration of those evaluations in this case might have proved useful. The Grievant received high marks for understanding City and

departmental policy and for being able to motivate those he supervises. As recently as August 2005, the City said the Grievant "exceeds standards" with regard to demonstrating an understanding of department, city rules, and regulations. In another recent evaluation, the City said the Grievant "exceeds standards" for evaluating, rewarding and disciplining the employees he supervises. The comment section included the following: "Appropriately addresses and recognizes quality work and performance. Redirects employees with fairness to avoid added conflict." (Union Ex. 2d)

Nothing in the record indicated that the Grievant was anything other than a reliable and dependable long-term employee. Even his disciplinary record did not provide any indication that the Grievant had done anything wrong other than failing to see the doctor on the day he called in sick. (Union Ex. 3a and 3b)

The City suspended the Grievant in 2004 for what it claimed to be his unauthorized devotion of work time to Union business. However, the City withdrew the order of suspension. Thus, the Grievant's disciplinary record simply contained two written reprimands regarding his failure to see a doctor in a timely fashion after calling in sick. In any event, having found the Grievant's conduct appropriate, no grounds for discipline exist.

Award

The Grievance is sustained. The City is hereby ordered to compensate the Grievant for the two 24 hour work shifts that he was deprived of by the wrongful suspension. The City is also hereby ordered to remove any record of the suspension from the Grievant's official personnel file.

_____ _____

Arthur Ray McCoy Date
Arbitrator